VERMONT SUPERIOR COURT
Windsor Unit
12 The Green
Woodstock VT 05091
802-457-2121
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 21-CV-01663

Debra Tyler et al v. Erica Wolff

**DECISION ON MOTIONS FOR SUMMARU JUDGMENT**

Plaintiffs Debra Tyler and Michael Bandler have sued Defendant Erica Wolff, seeking injunctive relief and damages arising out of the alleged theft of a horse and his semen. Ms. Wolff counterclaimed, seeking a declaration of her ownership of the horse and several other unrelated remedies. Both sides have moved for summary judgment on the question of ownership of the horse. Ms. Wolff also moves for summary judgment on the theft of semen. Finally, Ms. Wolff moves for summary judgment against Mr. Bandler, arguing that he lacks standing. The court denies Plaintiffs' motion, grants Ms. Wolff's standing motion, and grants her motion with respect to ownership of the horse and theft of semen in part and denies it in part.

**BACKGROUND**

Under Rule 56, the initial burden falls on the moving party to show an absence of dispute of material fact. *E.g.*, *Couture v. Trainer*, 2017 VT 73, ¶ 9, 205 Vt. 319 (citing V.R.C.P. 56(a)). When the moving party has made that showing, the burden shifts to the non-moving party; that party may not rest on mere allegations, but must come forward with evidence that raises a dispute as to the facts in issue. *E.g.*, *Clayton v. Unsworth*, 2010 VT 84, ¶ 16, 188 Vt. 432 (citing *Alpstetten Ass'n, Inc. v. Kelly*, 137 Vt. 508, 514 (1979)). Where that party bears the burden of proof on an issue, if fairly challenged by the motion papers, it must come forward with evidence sufficient to meet its burden of proof on that issue. *E.g.*, *Burgess v. Lamoille Housing P'Ship*, 2016 VT 31, ¶ 17, 201 Vt. 450 (citing *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989)). The evidence, on either side, must be admissible. *See* V.R.C.P. 56(c)(6); *Gross v. Turner*, 2018 VT 80, ¶ 8, 208 Vt. 112 ("Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party . . . must come forward with admissible evidence to raise a dispute regarding the facts."). The court must give the non-moving party the benefit of all reasonable doubts and inferences. *Carr v. Peerless Ins. Co.*, 168 Vt. 465, 476 (1998). Thus, "[i]n determining the existence of genuine issues of material fact, courts must accept as true the allegations made in opposition to the motion for summary judgment, so long as they are supported by

affidavits or other evidentiary material." *Gates v. Mack Molding Co.*, 2022 VT 24, ¶ 13, 216 Vt. 379 (quotation omitted).

Here, while both parties have submitted statements pursuant to V.R.C.P. 56(c), neither has properly shown an absence of dispute as to many of their asserted facts. Equally, Ms. Tyler and Mr. Bandler have failed properly to controvert many of the facts that Ms. Wolff did properly show to be undisputed. The court need not detail each instance in which one party or the other has fallen short. It suffices instead to state that the properly undisputed facts establish the following narrative.

At the outset of the events that underlie this action, Ms. Tyler was the owner of Lord Luciano, a Trakehner stallion. On July 7, 2017, Ms. Wolff loaned Ms. Tyler $26,000, pursuant to a written agreement, with Lord Luciano as collateral for the loan. Under the agreement, Ms. Wolff assumed responsibility for Lord Luciano's "general maintenance bills and training expenses." The agreement required repayment by January 7, 2021. It provided further, "[i]f payment is not possible, [Ms. Wolff] assumes ownership of [Lord Luciano], and [Ms. Wolff] assumes breeding rights, but [Ms. Tyler] receives free breeding for her horses." The agreement was never modified in writing. While Ms. Tyler asserts in her "certification" that the agreement was "modified by subsequent events," this bald assertion is insufficient to create a genuine dispute as to the continued validity of the original agreement.[1] Thus, as discussed below, the agreement remained at all times in full force and effect. Subsequently, in her answers to Ms. Wolff's Requests to Admit, Ms. Tyler admitted that "if the Loan was not repaid, [Ms.] Wolff assumed ownership of Lord Luciano."

The agreement made no provision for breeding or the collection and sale of semen. Separately, in 2018, the parties agreed that Ms. Wolff would act as Ms. Tyler's agent for purposes of breeding Lord Luciano. There is insufficient evidence properly before the court to allow a determination as to the scope or duration of that agreement. Significantly, Ms. Tyler and Mr. Bandler, on whom the burden rests, offer no competent evidence either that Ms. Wolff was not authorized to collect and freeze Lord Luciano's semen or, importantly, that she ever converted that semen to her own use and benefit. Rather, the only evidence is that Ms. Wolff had semen collected and frozen by a third party in September 2020, subsequently asked Ms. Tyler if she wanted the semen, and Ms. Tyler refused. *See* Responses to Def.'s 1st Interrogatories, ¶ 34.[2]

---

[1] The court notes that this certification could fairly be characterized as a "sham affidavit." It contradicts earlier, unequivocal discovery responses, makes conclusory assertions unsupported by the record, and is neither sworn nor properly certified as required by 4 V.S.A. § 27b. Thus, the court may properly disregard this assertion. *Cf. Johnson v. Harwood*, 2008 VT 4, ¶ 5, 183 Vt. 57.

[2] Some of this evidence comes from settlement discussions between Ms. Tyler and Ms. Wolff during the winter of 2021, and so may not properly be admissible. The court includes the evidence in the discussion above to make clear that this is the most Plaintiffs could possibly prove.

January 7, 2021, came and went without either repayment of the loan or even offer to repay. Indeed, on January 4, 2021, Ms. Tyler had sent Ms. Wolff an email in which she reported that she had "told Dr. Schmidt that I no longer owned [Lord Luciano], worst decision I ever made, that you were his owner." While Ms. Tyler now attempts to characterize the "worst decision I ever made remark" as referring to "misrepresenting the ownership of Luciano to Dr. Schmidt at [Ms. Wolff's] request," a fair reading of the email supports the conclusion that Ms. Tyler was acknowledging that she no longer owned Lord Luciano. The court need not determine this to be an undisputed fact, however, as it is not truly material. Rather, as discussed below, it is sufficient to note the absence of dispute as to the lack of payment or tender by January 7, 2021.

After January 7, 2021, Ms. Tyler and Ms. Wolff communicated in an attempt to resolve their differences amicably. Those communications, of course, are protected by V.R.E. 408. Thus, no part of the communications between the parties after January 7, 2021, is properly before the court. Obviously, they did not bear fruit, leading to this litigation. Significantly, even were the court to disregard the proscriptions of Rule 408, there is no competent evidence that Ms. Tyler ever made a tender within the contemplation of 9A V.S.A. § 9—623.[3]

On June 1, 2021, Ms. Tyler entered into an agreement with Mr. Bandler, purporting to convey a 10% interest in Lord Luciano. Per the agreement, the "co-owners' agreed to "split in a 90%/10% manner any and all care of Luciano and revenue generated by him." The agreement did not purport to assign any rights against any third party.

## DISCUSSION

As a threshold matter, the court addresses Mr. Bandler's standing. It is undisputed that Mr. Bandler was not a party to any contract; nor has he shown that he was an intended third-party beneficiary of any contract. Equally, he has not shown that he is an assignee of Ms. Tyler's claims. At best, he acquired an interest in Lord Luciano—and that only after the proverbial horse had left the barn. This interest is insufficient to demonstrate Mr. Bandler's standing to sue.

"An element of the case or controversy requirement is that plaintiffs must have standing, that is, they must have suffered a particular injury that is attributable to the defendant and that can be

[3] Ms. Tyler did submit an affidavit that recites, "Ultimately, Ms. Tyler emailed Defendant to let her know that there would be no negotiated settlement of the Loan Agreement and asking to make arrangements to come with a full Loan repayment and pick up Luciano." This is not competent evidence for at least two reasons. First, Ms. Tyler has not complied with the best evidence rule, such as would allow the court to admit her testimony concerning the content of the email. *See* V.R.E. 1002. Second, the document she attaches as an exhibit is not properly authenticated and indeed belies her characterization. The chronology set forth in her affidavit suggests that the "email" was the final salvo in a back and forth between the parties, when the content of the exhibit make clear that it was at best an intermediate step that occurred a month or more earlier than the affidavit would suggest. In any event, it fell short of being the tender contemplated by § 9—623.

redressed by a court of law." *Parker v. Town of Milton*, 169 Vt. 74, 77 (1999). Here, there can be no suggestion that Mr. Bandler suffered a particular injury attributable to Ms. Wolff. He acquired an interest—of whatever value—in a horse and whatever revenues that horse may generate. If that interest proves to be worthless, it is not because of anything Ms. Wolff did to impair the interest, but because it was worthless *ab initio*. In short, if Ms. Tyler sold Mr. Bandler a pig in a poke, his remedy, if any, lies against her.

This discussion, however, may be academic, because Ms. Tyler has not yet shown that she has a viable claim against Ms. Wolff. The contract between Ms. Tyler and Ms. Wolff governs any such claim. That contract is clear: if Ms. Tyler was unable to repay the loan by January 7, 2021—and it is undisputed that she made no offer or attempt to repay before that date—then Lord Luciano became Ms. Wolff's.

Ms. Tyler does not properly dispute this interpretation of the contract. Instead, she offers two arguments to avoid the straightforward application of clear and unambiguous terms. First, she suggests that the contract was somehow "modified by subsequent events" or breached by Ms. Wolff when she "stole" Lord Luciano's semen. Second, she argues that under the Uniform Commercial Code, she retained the right at any time to redeem Lord Luciano by tendering the full amount due under the loan. The court addresses these arguments in turn.

The first argument fails for two fundamental reasons. First, Ms. Tyler does not show or even suggest how the parties modified the contract, much less what events effected such modification. She has admitted that the agreement was never modified in writing, and she has not suggested or shown that there was any subsequent oral modification. In short, she has not shown anything but that the original agreement remained in full force and effect. Second, to the extent that she argues that the "theft" of semen somehow breached or modified the contract, she has shown neither that the contract covered semen nor that Ms. Wolff stole it. Thus, the contract remained in full force and effect, and is enforceable on its express terms.

The second argument is more problematic, precluding summary judgment for either side. Ms. Tyler asserts a right, under Section 9 of the UCC, to notice and opportunity to redeem. *See* Supplemental Letter Brief (April 13, 2023), 5. That right, to be clear, does not arise by virtue of the parties' agreement; the agreement required neither notice nor opportunity to redeem. It arises instead by operation of law. The UCC gives a debtor the right to redeem collateral. *See* 9A V.S.A. § 9—623. While generally, parties are free to vary the provisions of the UCC by agreement, *see id.* § 1–302, the UCC limits that freedom with respect to secured transactions. One such limitation extends to the right to redeem collateral. *Id.* §9—602(11). Notwithstanding this limitation, a debtor may waive the right to redeem. *See id.* § 9—624(c). Unfortunately, neither party's submission addresses the factual underpinnings of a potential waiver. Thus, the court cannot grant summary judgment to either side on the question of ownership of Lord Luciano.

Even if Ms. Tyler had properly shown that she did not waive her right to redeem, that would not end the inquiry. The right is not unconditional. The debtor must make a conforming tender, and it must

make that tender before any one of three events has occurred. *See* 9A V.S.A. § 9—623(b), (c). Here, Ms. Tyler has not shown that she made a conforming tender. Even if she had, the undisputed facts do not allow the court to determine whether at least the third event—acceptance of the collateral in full satisfaction of the debt—had occurred. This unresolved question also precludes the grant of summary judgment for either side on the question of ownership of Lord Luciano.

**ORDER**

The court grants Ms. Wolff's motion for partial judgment against Mr. Bandler; all his claims are dismissed with prejudice. The court denies Ms. Tyler's motion for partial summary judgment, and grants Ms. Wolff's cross-motion in part and denies it in part. Count II – Theft of Semen is dismissed with prejudice. Count I – Theft of Luciano remains for adjudication, as does all of Ms. Wolff's counterclaim. The clerk will schedule a status conference, to discuss plans for resolution of the remaining claims.

Electronically signed pursuant to V.R.E.F. 9(d): 8/21/2023 2:55 PM

Samuel Hoar, Jr.
Superior Court Judge